

***United States Court of Appeals
for the Second Circuit***



REPLY BRIEF

74-1550

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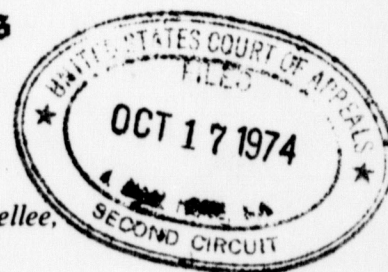
To be argued by
HERBERT S. SIEGAL

In The
United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,



vs.

CARMINE TRAMUNTI,

Appellant,

and

LOUIS INGLESE, a/k/a "Gigi", JOSEPH DELVECCHIO,
a/k/a "Joe Crow", DONATO CHRISTIANO, a/k/a
"Finnegan", THOMAS LENTINI, a/k/a "Moe", ANGELO
MAMONE, a/k/a "Butch", JOSEPH DINAPOLI, CARMINE
PUGLIESE, PAT DILACIO, FRANK PUGLIESE, a/k/a
"Butch", JOSEPH CERIALE, a/k/a "Joe Red", JOHN
GAMBA, a/k/a "Sinatra", ANTHONY LORIA, VINCENT
D'AMICO, a/k/a VINCENT RIZZO, DONINICK LESSA,
BENJAMIN TOLOPKA, GEORGE TOUTOIAN, FRANK
PELLEGRINO, a/k/a "Swift", JOSEPH MARCHESE,
a/k/a "Joe Cab", RICHARD FORBRICK, FRANK RUSSO,
WARREN C. ROBINSON, a/k/a "Alan", THOMAS
DOWSON, a/k/a "Tennessee", AL GREENE, WILLIAM
ALONZO, a/k/a BUTCH WARE, HATTIE WARE, JOHN

(Continued on Reverse)

REPLY BRIEF

SPRINGER, a/k/a "Hank", MARY JANE SALVIANI, a/k/a
"Liz", HENRY SALLEY, BASIL HANSEN, ESTELLE,
HANSEN, and JOHN DOE, a/k/a "Jimmy Wyatt Earp",
Defendants.

*Appeal from the United States District Court for the Southern
District of New York.*

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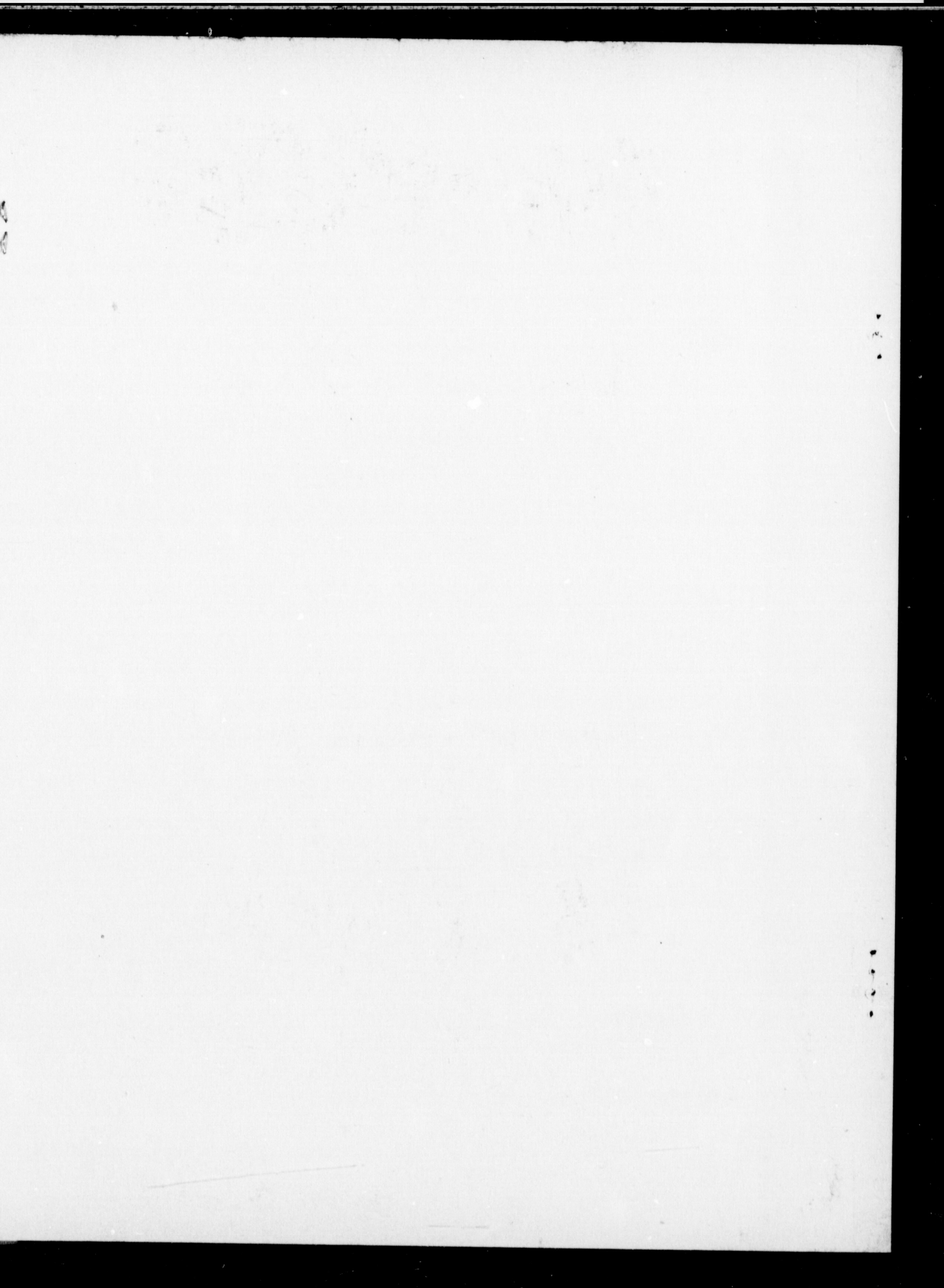


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----- X

UNITED STATES OF AMERICA :

Appellee :

-against- :

CARMINE TRAMUNTI, et al. :

Appellants :

----- X

APPELLANT TRAMUNTI'S REPLY BRIEF

I. ANSWERING RESPONDENT'S POINT I

The Government argues that there is a failure by the Appellant Tramunti to show that he was substantially prejudiced by the Court's denial of his motion for a severance. The record however clearly demonstrates that from the face of the pleadings alone it was obvious that the alleged involvement of the Appellant Tramunti in the conspiracy charged was extremely limited. That the trial itself would be lengthy was obvious and equally obvious was the fact that the evidence against Tramunti was meager and could be, and was presented in a very brief period of time.

The Government contended before trial and still contends that Tramunti joined the conspiracy in January, 1973. They

argued however to the jury on trial and to this Court on appeal that the presence of Vincent Di Napoli at the home of his brother Joseph Di Napoli after the latter's arrest on February 3, 1972 is proof of a link between Carmine Tramunti and the narcotic operations of Joseph Di Napoli. The Government agrees that their sole basis for such a proposition is the fact that on February 12, 1973 Vincent Di Napoli, Carmine Tramunti and Frank Stasi went to the Tear Drops Bon Soir to listen to Buddy Rich's Band. Moreover the Government points with pride to the fact* that the jury could hardly miss the significance of Vincent Di Napoli's presence (presumably as Tramunti's alter ego) at his brother's home on a night when his brother and Vincent Papa were arrested in possession of one million dollars. Yet this suggestion which the Government encouraged and the Appellant sought to avoid by moving for a severance so that the Government could not pursue it's "birds of a feather" theory, clearly demonstrates just the high degree of prejudice that the Appellant suffered, not as a result of his own actions, but as a result of the Government's draftmanship in drawing the indictment.

The Appellant Tramunti moreover was severely prejudiced by the inclusion of a count, number twenty-seven, in the indictment which charged him, Louis Inglese, Joseph Delvecchio and

* Pages 39 and 40 of the Government's brief.

Joseph Ceriale with distributing three kilograms of heroin in May 1973, when the Government knew that there was no basis for such an accusation. The Government has never offered any explanation for its failure to move prior to trial to dismiss Count Twenty-seven when it knew that it had no evidence to support that charge. Frank Stasi testified that before going to the Grand Jury he discussed the case with federal agents and they were trying to establish dates for the various activities that Stasi was describing. Stasi, although he could not remember any dates, adopted the dates decided upon by the agents in his Grand Jury testimony even though he did not feel they were correct*. The witness later corrected the dates to some degree after talking with an assistant U.S. Attorney prior to the trial.** Prior to the trial then the Government knew that Stasi had never mixed or possessed heroin in 1973 and there was no basis for the inclusion of Count Twenty-seven in the indictment, yet the Government allowed it to remain.

There can be no question but that the government was guilty of "bad faith" in allowing Count Twenty-seven to remain in the indictment, when they knew prior to trial that they had no evidence to support such a charge. Whatever their reason

* Pages 755 and 756 of the transcript.

** Page 890 of the transcript.

for leaving in this count until the close of their case surely it can not be said to serve the interests of justice and undoubtedly had an effect upon the trial court's decision to deny the Appellant Tramunti's motion to sever.

Tramunti then sat for weeks, more in the role of a spectator than a defendant, listening to a recitation of acts and events which occurred more than a year prior to his allegedly becoming a member of the conspiracy. There was testimony about an attempt by one Burke to murder John Barnaba who had sold him "bad" drugs in the summer of 1971 prior to Barnaba's becoming a special employee; there was testimony about an attempt by a co-defendant Frank "Butch" Pugliese to murder one of his underlings prior to October, 1971. All this testimony was clearly damaging to the defendants at trial, but all the more so as to Tramunti since these activities were not undertaken by him or in his behalf, nor were they undertaken in furtherance of any conspiracy. Burke sought to kill Barnaba because he had been cheated on a drug transaction, while Pugliese sought to kill an underling who had withheld some money, but neither act can be said to be in furtherance of any conspiracy and was certainly prejudicial to the Appellant Tramunti.

The Appellant Tramunti was further prejudiced when he sought to introduce through the testimony of Albert Casella

a conversation between Carmine Miranda and Louis Inglese, and was prevented from doing so by the objection of of counsel for the co-defendant Inglese. That the statement which the Appellant Tramunti sought to introduce was admissible as evidence there can be no doubt. In United States v. Sperling, et al, docket No. 73-2363, decided October 10, 1974 (2d Cir. 1974), this issue was raised by the Appellant Jack Bless who claimed that his right to confrontation had been denied when a post-arrest, out-of-court statement by a witness who refused to testify at the trial was read to the jury at the request of another defendant who claimed the statement exonerated him while it inculpated Jack Bless. The Court held that Bless was not prejudiced by the reading of the statement (see footnote 22, United States v. Sperling, et al.)

In the instant case the statement was made in the course of the conspiracy, not after it was concluded, it was against the penal interests of both parties to the conversation, Miranda and Inglese and it was on tape and available to be played for the jury. Moreover the trial court did not exclude the proposed tender of evidence because it was hearsay, but rather because of some formula of balancing between the two-co-defendants. The proper remedy however should have been, as requested, to sever the Appellant Tramunti if the Court did not wish, in

the face of a co-defendant's objection, to admit the evidence in a joint trial.

The Appellant Tramunti, moreover, sought to subpoena Carmine Miranda by serving him with subpoenas at the two addresses supplied by the Government, but as Appellant sets forth in his brief (p. 39 footnote) was unsuccessful. Appellant's counsel was then supplied with the name of Carmine Miranda's lawyer Mr. Murray Richmond, Esq. Mr. Richmond indicated that he had no address for his client except for the ones already turned over to the Appellant by the Government, but that Miranda on his advice would exercise his fifth amendment privilege because of several pending state indictments. United States v. Domenesch, 476 F2d 1229 (2d Cir. 1973).

Thus it is quite clear that from the outset of the case the Appellant Tramunti was substantially prejudiced by being a defendant in a joint trial and the degree of prejudice increased as the trial went on.

II. ANSWERING RESPONDENT'S POINT II

The evidence at trial failed to show that the Appellant Tramunti was involved in the conspiracy charged, and it also failed to show that the Appellant Tramunti had knowledge of the purpose of the conspiracy.

When Inglese first told Tramunti that he expected some

"goods", Tramunti made no response, but merely nodded his head and held out his hands. This response is not only equivocal, but there was no proof that Tramunti understood "goods" to refer to narcotics. The word "goods" does not have universal recognition as a code name for narcotics as pointed out by Frank Stasi's testimony that when he was first approached by Inglese he did not know what the term "goods" or "junk" stood for.

The next piece of testimony to which the Government refers is between Stasi and Tramunti at the Teardrops Bon Soir, a night club in the Bronx. Tramunti tells Stasi he misses "the big guy" and that nothing is happening in the club. That is the entire conversation. Stasi, who knows the authorities are out to "get" Tramunti, then goes and testifies that he told Inglese that Tramunti wanted to know about the conversation and the money. The record is clear however that Tramunti never mentioned any conversation or money to Stasi.

Stasi, on different occasions, does his best to include Tramunti in situations where he knows, from statements made directly to him that Tramunti is not involved. Inglese tells Stasi that Joseph Delvecchio has someone with property to put up for Moe Lentini's bail. Stasi however turns around and tells Lentini, not one hour after his conversation with Inglese, that

Tramunti has someone with property.

The evidence is clear that the government's proof not only falls short of proving Tramunti's participation in the conspiracy, but further that the question of Tramunti's knowledge, which was as paramount importance, was not presented to the jury and therefore could not be resolved by them.

III. ANSWERING RESPONDENT'S POINT XI

The government in it's summation referred to the presence of Vincent Di Napoli in the courtroom and now states that they were merely referring to his availability and the failure of the defense to call him.

The record however reveals* that the Government, during the trial and again in summation, referred to Vincent Di Napoli in an effort to show that he was the bodyguard of Carmine Tramunti. The Government's repeated reference to Vincent Di Napoli throughout the trial, first by having Frank Stasi identify him in the Spectator Section of the courtroom, and then by trying to have a police officer James O'Donnell testify that a heavy set man tried to "frisk" him as the officer went to the men's room, was an attempt to portray Vincent Di Napoli as Tramunti's bodyguard in an effort to bolster their theory that Vincent Di Napoli, and by insinuation Carmine Tramunti, had something to do with the million dollars that was seized on February 3, 1972 from Joseph Di Napoli.

* Page 1121 of the Transcript.

The Government's theory on this appeal that it's comment about Vincent Di Napoli in summation was merely to show that he was available to testify as a witness is dishonest. Vincent Di Napoli had every right and every reason to be present at the trial of his brother Joseph, and moreover the government knew from the testimony of it's own witnesses, that the conversation between Stasi and Tramunti was carried on by one man talking into the other man's ear and that a man, never identified, stood behind Tramunti and Stasi at a distance of three or four feet for most of the evening. The record is very clear that the three police officers who were at the Tear Drops Bon Soir on February 12, 1973, Kevin Daly, James O'Donnell and Francis J. Connelly, did not identify the man standing behind Stasi and the Appellant Tramunti as Vincent Di Napoli.* The only government witness who places Vincent Di Napoli at the Bon Soir Tear Drops is Frank Stasi, who testified that Vincent Di Napoli was there with his wife, his younger brother and his date. Di Napoli's sister and husband and two unescorted females were also present at the table. There is no testimony, however, from Stasi about any individual standing behind him.** Thus it is clear that the Government did not refer to Vincent Di Napoli in summation as merely a possible witness, because there is no evidence

* See pages 954-957, 113-114 and 1193 of the transcript.

** See pages 388-389 and 511-512 of the transcript.

that he or anybody else was in a position to hear any conversation between Stasi and Tramunti, but rather in an effort to insinuate that he was there in court as Tramunti's bodyguard. The Government thus did attempt to introduce an element of intimidation into the courtroom.

IV. ANSWERING RESPONDENT'S POINTS XIII AND XV.

We believe that the issue have been fairly joined and rest upon the arguments made in our main brief.

CONCLUSION

THE JUDGMENT APPEALED FROM
MUST BE REVERSED.

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Of Counsel
GILBERT EPSTEIN

Dated: New York, New York
October 15, 1974

US COURT OF APPEALS: SECOND CIRCUIT

USA,

Appellee,

against

TRAMUNTI,

Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

I, Victor Ortega,

being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

1027 Avenue St. John, Bronx, New York

That on the 17th day of October 1974 at Foley Square, New York

deponent served the annexed

Reply
Respondent's Brief

upon

Paul J. Curran

the in this action by delivering ³ true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

Sworn to before me, this 17th
day of October 19 74

Victor Ortega
Print name beneath signature

VICTOR ORTEGA

ROBERT .. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975